IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

THURSDAY, THE 4TH OCTOBER 2007 / 12TH ASWINA 1929

FAO.No. 215 of 2007()

AGAINST THE ORDER DATED 14/06/2007 IN EA.218/06 IN EP.67/05
IN OS.3/2002 of SUB COURT,KOTTARAKKARA
.....

APPELLANTS/PETITIONERS

1. SIVAKUMAR, S/O.P.THYAGARAJAN,
PONNAIH BHAVAN, T.B.JUNCTION,
PUNALUR, PUNALUR VILLAGE, PATHANAPURAM TALUK.

2. T.KRISHNA KUMAR, S/O.THYAGARAJAN,
PONNAIH BHAVAN, T.B.JUNCTION,
PUNALUR, PUNALUR VILLAGE, PATHANAPURAM TALUK.

3. P.THYAGARANA, S/O.LATE PONNAIAH CHETTIAR
PONNAIH BHAVAN, T.B.JUNCTION, PUNALUR,
PUNALUR VILLAGE, PATHANAPURAM TALUK.

BY ADV. SRI.T.KRISHNAN UNNI

RESPONDENTS: RESPONDENTS

1. FEDERAL BANK LIMITED,
REPRESENTED BY ITS BRANCH MANAGER,
FEDERAL BANK LTD., PUNALUR.

2. CHACKOCHAN, S/O.MATHAI,
PUTHUSSERI VEEDU, IKKARAKONAM MURI,
VALAKKODU VILLAGE.

BY ADV. SRI.JOY GEORGE(CAVEATOR)
SRI.JOY GEORGE
SMT.PRAICY JOSEPH

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON13.9.2007, THE COURT ON 04/10/2007, DELIVERED THE FOLLOWING:

P.R. RAMAN & V. K. MOHANAN, JJ.

F.A.O. NO. 215 OF 2007

DATED THIS, THE 4TH DAY OF OCTOBER, 2007.

J U D G M E N T

Raman, J.

Appellants are the defendants in O.S. 3 of 2002 on the file of the Subordinate Judge's Court, Kottarakkara. The plaintiff in the said suit is the first respondent and the auction purchaser is the second respondent herein. The suit was one for realisation of money which was decreed ex parte for realisation of an amount of Rs. 6,85,993/- with interest thereon at the rate of 12% per annum till the date of the decree and thereafter at 6%. The plaintiff - decree holder sought to execute the decree by filing E.P.67/2005. The property belonging to the first defendant was brought for sale in execution and it was sold on 25.8.2006 to the second respondent for an amount of Rs. 9,88,800/-. The appellants filed E.A. 218/2006 under Order 21 Rule 90 of the Code of Civil Procedure for setting aside the above sale. Objections were filed by the auction purchaser and after hearing both sides, by the impugned order, the court below dismissed the application.

2. It is contended by the learned counsel appearing for the appellant that the court below ought to have accepted the contention of the appellants

that the value of the property shown in the proclamation has no comparison with the actual value of the property, that the difference in the amount is so high and excessive, which according to him, is sufficient ground for setting aside the sale, that there was no proper publication of the sale proclamation, that the grounds urged were not available to them before the sale proclamation and as such, the bar under Sub-rule 3 of Order 21 Rule 90 of the Code of Civil Procedure is not applicable in this case, that the decree debt could have been satisfied by selling a portion of the property and as such, the court below do not have jurisdiction to sell the entire property and that being a question of jurisdiction, the same can be raised at any stage, before the confirmation of sale.

3. Per contra, the respondents would contend that the appellants were served with notice under Order 21 Rule 66 CPC. and in spite of the notice received by them, no objections were filed. The appellants were thus declared ex parte and the proclamation was settled on 28.3.2006 and thereafter notice of sale was published as contemplated by law. The sale itself was adjourned twice earlier for want of purchasers and it was ultimately that the sale was conducted in which the second respondent bid the auction and deposited the entire amount. Though the present objections

were filed on 8.8.2006, the appellants did not seek to set aside the ex parte order nor did he raise any valid grounds as to why they could not file any objection pursuant to the notice under Order 21 Rule 66 CPC. According to them, the very objections now raised could have been raised to the notice under Order 21 Rule 66; but they remained ex parte and did not raise any such objection and hence the present objection raised more than five months after the settlement of proclamation is clearly barred as per the provisions contained in sub-rule 3 of Order 21 Rule 90 CPC. It is further contended that the attempt is only to protract the proceedings and the court below in such circumstances, has rightly dismissed the application and there is no merit in the contentions raised in this appeal.

4. The court below considered the question as to whether the sale conducted on 25.8.2006 is liable to be set aside on the ground of irregularity and fraud. There was no allegation by the appellants that any fraud has been committed by any of the parties to the proceedings. According to the appellants, the property sold in auction will fetch more than Rs. 40 lakhs and it was sold for a meager amount of Rs. 8 lakhs. Yet another contention was that the sale proclamation was not published properly. The court held that the mere allegation that the sale proclamation was not published

properly is not a ground for setting aside the sale conducted after proclamation duly settled. From the records, it is evident that the proclamation was published properly and thus the contention was held unsustainable. As regards the contention that the value suggested by the judgment debtors was not included in the proclamation schedule, it was found that the objection, if any, to Order 21 Rule 66 notice ought to have been filed before the settlement of proclamation.

5. In this case, the judgment debtors, after accepting the notice under Order 21 Rule 66 CPC failed to appear in court and they opted to remain ex parte. When the judgment debtors were called on 10.1.2006, they were absent and the case stood posted for return of notice under Order 21 Rule 66 CPC. They did not file any objection to the execution petition or to the proclamation schedule and it was in such circumstances that the proclamation was settled by the court below on 28.3.2006 and steps were taken for sale of the property. Even though the appellants filed objection thereafter on 8.8.2006, they did not file any petition to set aside the ex parte order passed against them. After referring to sub-rule 3 of Rule 90, Order 21 CPC the court below found that the appellants who could have filed their objection on or before the date of proclamation failed to raise

any such objection and in the fatual situation, the application is liable to be dismissed. Once they have not raised any objection to the notice under Order 21 Rule 66, thereafter they cannot raise such objection regarding the value of the property, after settling the proclamation, unless there are valid reasons. Reference was also made to the decision of this Court in **Sreedharan v. Union of India** (1992(2) KLT 642), where a similar view was taken. The court below, on an overall consideration of the materials on record, came to the conclusion that the petitioners cannot raise any objection to the value of the property and the sale cannot be set aside on the ground that the value shown in the proclamation schedule is inadequate. The attempt of the petitioners was held to be with a view to protract the execution proceedings. In the circumstances, the application was dismissed. The correctness of the said decision rendered by the court below, arises for consideration in this appeal.

6. The following facts are beyond dispute: That the petitioners received a notice under Order 21 Rule 66 of the Code of Civil procedure. They did not file any objection raising any challenge to the value of the property as suggested by the decree holder and they opted to remain ex parte. They did not seek to set aside that order even subsequently. In this

connection, it may be noticed that they even remained ex parte and an exparte decree was passed and became final. It was only when the proceedings were taken for sale of the property that the petitioners/appellants came to file the present objection raising objection to the proclamation value.

7. We may now refer to the relevant provisions contained in the Code of Civil Procedure regarding as to how the sale should be conducted. As per Order 21 Rule 66, where any property is ordered to be sold in public auction in execution of a decree, the court shall cause a proclamation of the intended sale to be made in the language of such court and such proclamation is to be drawn up after notice to the decree holder and the judgment debtor and shall state the time and place of sale and specify as fairly and accurately as possible, the property to be sold or where a part of the property would be sufficient to satisfy the decree, such part. Any encumbrance to which the property is liable to, the amount for recovery of which the sale is ordered, etc. As per the proviso to Order 21 Rule 66, nothing in the said rule shall be construed as requiring the court to enter in the proclamation of sale its own estimate of the value of the property, but the proclamation shall include the estimate, if any, given by either or both of

the parties. In this case, no value was suggested by the judgment debtor as he remained ex parte. Therefore, there was no occasion to include the suggested value of the judgment debtor. Rule 67 of Order 21 prescribes the mode of publishing notice of sale. Rule 68 provides that except in the case of property of the kind described in the proviso to Rule 43, no sale without the consent in writing of the judgment debtor, take place until after the expiration of at least fifteen days in the case of immovable property and seven days in the case of movable property. Rule 69 empowers the court to adjourn/stop the sale after recording its reasons. The appellant has no case that there was any failure or infraction of rules of procedure as above in the matter of proclamation of sale by the court below. As rightly found, there is no allegation made in the application now filed alleging any fraud. The material irregularity complained of, according to the appellant, is that the property was sold for a meager amount, as according to him, the property will fetch more than Rs. 40 lakhs. Obviously, this is an objection which he is entitled to raise before settling the proclamation and there is no sufficient reason as to why he did not raise any such objection at the appropriate time before settlement of proclamation by the court below.

In this connection, we may notice that as per sub-rule 3 of Order 21

Rule 90 CPC, the court cannot entertain an application to set aside a sale under this rule upon any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up. Therefore, the contention of the appellant that the property will fetch a higher amount cannot be taken up after the proclamation of sale was drawn up, as this was a ground which he could have taken up before settlement of proclamation.

8. Learned counsel for the appellant submitted that the court below ought to have considered that a part of the property, if sold, will be sufficient to satisfy the decree amount and since the entire property has been sold for a meager amount, it affects the jurisdiction of the court which he is entitled to raise at any point of time. He placed reliance on the decision of this Court in Gnan Das v. Paulin Moraes (1998(2) KLT 88) . We have perused the said decision and given our anxious consideration. We find that the said decision has no application to the facts and circumstances of this case. That was a case where an extent of 40 cents of land with a building thereon and another 3 cents with a building belonging to the judgment debtor and his wife were attached and Order 21 Rule 66 notice was issued and eventually the property was sold. This court found that the decree

amount was only Rs. 60,000/- and at no point of time, the executing court had addressed itself as to whether one item of property will satisfy the amount. In that case, there were two items of property with buildings thereon which were included in the proclamation of sale. When the property which is sought to be sold is considerably large, compared to the decree amount, the executing court has to consider the question as to whether by sale of a portion of the land, the decree could be satisfied. At the same time, in para 16 of the judgment, this court observed as follows:

> "However, we make it clear that it is not as if in every case the court has to reassess or re-examine whether it has committed an illegality. Mere inadequacy of price cannot demolish every court sale. But the executing court is only concerned with the question as to whether there is any failure in discharging its statutory duty or that it has acted beyond its jurisdiction. Therefore, even at the time of when sale is sought to be confirmed under O.XXI, R.92, court can consider whether it acted beyond its jurisdiction."

9. In the aforementioned facts and circumstances of the case,t he court found that the court below acted beyond its jurisdiction in selling both the items of property.

10. In **Bahuleyan v. Moosa** (2006(4) KLT 882) a learned Judge of this Court, after referring to the provisions contained in Order 21 Rule 66(2) and the second proviso thereto, held that after the introduction of the second proviso to Rule 66(2), executing court is not bound to make an estimate of its own and fix upset price and it will be sufficient if the value of the property estimated by both the decree holder and the judgment debtor are shown in the sale proclamation. It was also held that Rule 90(3) is not applicable where the procedure for sale adopted by the executing court is in violation of the mandatory requirements of the Rules.

11. That was a case where the judgment debtor admittedly estimated the value of the property in the objection filed by him before the executing court. It was also stated in the objection that the property sought to be sold is a residential compound of the judgment debtor and that the sale of portion of the property excluding the house will be sufficient to the satisfaction of the decree. The executing court did not advert to the said objection and did not pass any considered order regarding the value of the property and the nature of the amount involved. It was in those circumstances, that it was held that the bar under sub-rule 3 of Rule 90 of Order 21 of the Code of Civil procedure would not apply to the facts of that

case.

12. Coming to the facts of the present case, it could be seen that the appellant admittedly did not file any objection to the proclamation suggesting any value. The right to object to the proclamation value or to suggest his own value is available to him pursuant to the notice received under Order 21 Rule 66 CPC. When a person did not raise any such objection, according to us, the bar under Order 21 Rule 90(3) will squarely apply, unless the objection goes to the root of the matter raising jurisdictional error. When there is a clear bar under Rule 90(3) of Order 21 CPC, the court is bound to give effect to the said rule, while adjudicating the claim raised by the parties and see whether the bar as such would apply to the factual situation. If the objection was relating to the value of the property, it has to be said that this is a matter which the judgment debtor could have taken up before the date on which the proclamation of sale was drawn up. To say otherwise, would be to render the rule ineffective and otiose If the contention of the petitioner that even after the sale, he could raise the objection regarding the value proclaimed is accepted, then, the effect will be to ignore the specific bar created under sub-rule 3 of Rule 90, Order 21 CPC, which is impermissible under law.

13. The appellants did not seek to file any application under Order 21 Rule 89 CPC by making the pre-deposit of the amount as prescribed therein. Therefore, in order to attract the provisions contained in Order 21 Rule 90, there should either be a material irregularity or fraud committed in the matter of publishing or conducting the sale. The court below has already found that there was no such irregularity or fraud in publishing or conducting the sale and we endorse the said view.

14. Then the only other question to be considered is whether the court below has committed any jurisdictional error affecting the root of the matter. It was the specific contention of the auction purchaser in his objection to the petition filed before the court below that the present application filed was without any bona fide, that all the procedural requirements had been followed in the matter of conducting the sale, that on two earlier occasions the the property was posted for sale; but there was no intending bidders and if as a matter of fact, if the property would fetch more amount than the amount for which it was sold, such a situation would not have occasioned and that it was in the third occasion that the property was sold and purchased by the auction purchaser. In the proclamation notice the value shown is Rs. 5 lakhs, that the sale notice was published as

required by law and the sale was conducted in a public auction and that the appellants herein also did not produce any document to prima facie show that the property will fetch a higher amount.

15. It is true that if the property is sold for much higher amount than the decree debt payable, the question may arise as to whether a portion of the property alone if sold will be sufficient for satisfying the decree, and therefore, even in the absence of any objection raised by the judgment debtor to the notice under Order 21 Rule 66, if eventually, the property is sold and the sale price itself would indicate that a lesser extent ,if sold, would be sufficient to satisfy the decree then it could be said that there is a jurisdictional error and applying the dictum laid down in the Bench decision reported in Gnan Das's case, (1998(2) KLT 88) relief could have been granted to the appellant. But in the present case as already noticed, the decree itself is for an amount of Rs. 6,85,993/- with 12% interest and the property was sold after adjourning the sale on earlier two occasions and the property could be sold only on the third occasion for want of bidders and fetched a price of Rs. 8 and odd lakhs. The extent of the property which was sold is only 9 cents and 850 Sq. links and an old tiled building thereon. Thus, it can be seen that the property that was sold was not a large extent of

property and even on considering the purchase price and the decree amount to be realised, there is hardly a reason to hold that the property of a lesser extent, if sold, would satisfy the decree amount. Therefore, the case cited by the learned counsel for the appellant cannot be made applicable to the peculiar facts and circumstances of the case. We find that there is no error of law or jurisdiction committed by the court below. The appeal is thus liable to be dismissed.

16. Learned counsel appearing for the appellants at this stage prayed that even though he did not prefer an application under Order 21 Rule 89 CPC., he may be given an opportunity to deposit the entire amount and even offered to pay a substantial amount by way of damages to be paid to the auction purchaser, without conditioned upon his ultimate success in the event of his showing that the property will fetch a higher amount.

17. We have seriously given our thought to this request and we heard the other side also. In this connection, it has to be noticed that what remains is only the delivery of the property. The sale deed has already been executed on the stamp paper and the entire amount has been deposited by the auction purchaser. Admittedly, the appellant did not make the deposit within time allowed by law and filed any petition. We noticed that under

Order 21 Rule 89 an amount equivalent to 5% of the purchase money to be paid to the purchaser is to be deposited by the judgment debtor. At this belated stage of the proceeding, if the appellants wanted a further opportunity to make the deposit, it cannot be granted on the same condition as contemplated under Order 21 Rule 89 rather the purchaser should be adequately compensated with.

18. Therefore, to meet the ends of justice, we think it appropriate that in case the appellant deposits the entire sale price and interest at 12% on the said amount from the date of sale till payment and also the value of the stamp paper, if any purchased by the auction purchaser for execution of the sale deed and a further amount equivalent to 10% of the purchase money before the court below within a period of forty five days from today, the court will give an opportunity to the appellants to prove their case that the price for which the property is sold is inadequate. The court below will then consider such evidence and pass appropriate orders and set aside the sale in case the price sold is held to be grossly disproportionate to the market value of the land. We make it clear that 10% of the sale price deposited before the court below will be paid to the decree holder by way of cost irrespective of the outcome of the adjudication based on such evidence to be adduced by

the appellant. In the event of the sale being set aside, the further amount deposited by the judgment debtors (appellants) as conditioned above will also be paid to the auction purchaser. In case the court below finds that the price for which the property is sold is adequate, based on the evidence so adduced by the appellant herein, the property will be delivered to the auction purchaser in which event, the amount deposited by the appellant herein, less the 10% amount already directed to be paid to the auction purchaser, will be returned to the appellants herein. In case the appellant fails to deposit the entire amount within time as directed above, the appeal will stand dismissed with cost of Rs. 10,000/- to the respondent.

P.R. RAMAN,
(JUDGE)

V. K. MOHANAN,
(JUDGE)

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